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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-634

UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,
Appellants,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

Brief for the Coalition of American Public Employees (Consisting of the National Education Association, the American Federation of State, County, and Municipal Employees, AFL-CIO, and the International Association of Fire Fighters, AFL-CIO), the American Federation of Government Employees, AFL-CIO, and the American Postal Workers Union, AFL-CIO, as Amici Curiae

The parties have consented to the filing of this brief, which supports the position of Appellees that the Court should affirm the decision below of a three-judge district court, reported as *National Ass'n of Letter Car.* v. *United States C. S. Com'n*, 346 F. Supp. 578 (D. D.C., 1972).

INTEREST OF AMICI CURIAE

The Coalition of American Public Employees is composed of three public employee organizations: the National Education Association, the American Fed-

eration of State, County, and Municipal Employees, AFL-CIO, and the International Association of Fire Fighters, AFL-CIO. Those organizations have a combined membership of some 1,940,000 (NEA, 1,200,000; AFSCME, 600,000; IAFF, 150,000), almost all of whom are employees of a State or local government or governmental body, and function as the bargaining representatives of approximately 3,000,000 such employees. The Coalition was organized in March 1971 to bring to bear upon the common concerns of government workers the collective power of organizations representing diverse employee groups in the public sector.

The American Federation of Government Employees, AFL-CIO ("AFGE"), is an unincorporated association and labor union composed of approximately 300,000 members, who are civilian employees of the Federal or District of Columbia governments. AFGE is the largest labor organization of non-postal federal employees, and is the exclusive representative of approximately 650,000 civilian government employees, including so-called blue collar, white collar, and professional classes of employees, dispersed through every major department and agency of the Federal Government. In that capacity, AFGE deals with management of the concerned agencies on grievances, personnel policies and other matters affecting working conditions of the employees it represents. It is charged with representing the interests of all those employees in a non-discriminatory manner and without regard to union membership by Sections 10(e) and 19(b)(1) and (5), Executive Order 11491, as amended, 36 Fed. Reg. 17319 (1971), and by Items b. (1) and (7), Chapter 25A, of the District of Columbia Personnel Manual. This representation covers disciplinary actions brought pursuant to the Hatch Act against employees, which are matters clearly affecting their working conditions.

The American Postal Workers Union, AFL-CIO ("APWU"), is composed of four crafts: the clerks, motor vehicle, maintenance, and special delivery messengers, as well as the former National Postal Union. It is a national union representing approximately 350,000 individuals who are located in postal installations throughout the United States. APWU bargains collectively for its members under the Postal Reorganization Act of 1970 (Title 39 of the U.S. Code). Under the provisions of Section 410 of that Act (39 U.S.C. § 410), the members of the United States Postal Service which APWU represents are specifically included within the coverage of the Hatch Act.

The special interests of the Coalition of American Public Employees and its constituent organizations, AFGE and APWU in this litigation are obvious. They represent many of the government employees whose political rights presently are circumscribed by the Hatch Act or comparable State or local laws. Those employees pay taxes, are subject to conscription for military service, and generally are subject to Federal, State and local laws on the same basis as other citizens without any exemption by reason of their status as government employees. The individual who is elected to a particular public office, the policies that a government adopts and the manner in which those policies are carried out, generally are as important to government employees in their capacity as citizens as they are to other citizens. These *amici* have a strong interest, therefore, in urging this Court to assure that government employees, such as those they represent, have the same constitutional rights as other citizens to participate actively in political campaigns and related political activities, restricted only in the narrowest way necessitated by compelling governmental interests.

These *amici* also have a broader interest in this litigation, one that we think is or should be shared by all citizens. As the Report of the Commission on Political Activity of Government Personnel (1967) observed, Vol. I, at 3, "in our democratic society it is important to encourage the participation of as many citizens as possible in the political processes which shape our government." All of us are the poorer when the range of potential candidates or of those eligible to participate in debate upon political issues is narrowed. When a Federal government employee is prohibited from being a candidate for the council of his city, for example, that city's voters generally also are deprived of the opportunity to have him as their candidate and to cast their votes in his behalf. A prohibition against driving voters to the polls affects those who would be driven as well as the government employee prohibited from doing the driving. If a government employee is prohibited from taking part in a political debate or making a political endorsement, those who might be persuaded by his arguments or by respect for his views also are harmed. In short, this litigation concerns not only the constitutional right of government employees to take an active part in the political process, but also the constitutional right of voters generally to select such persons as their candidates and to have the benefit of the speeches, endorsements or other political activities of such persons in deciding how to vote or what position to adopt in regard to political issues.

For these reasons, these *amici* believe that a decision in this case overruling *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), and affirming the decision below, is in the best interests not only of the government employees subject to the Hatch Act or to comparable State and local legislation, but also of the citizenry generally and the well being of American

political institutions. We are hopeful that this *amicus* brief will assist the Court in reaching that decision by applying those doctrines protecting First Amendment rights, including the right to participate actively in political processes, which the Court has firmly established in many other cases since *Mitchell* was decided.

STATEMENT OF THE CASE

In 1971, there were about 2,820,000 civilian employees in the executive branch of the Federal government, some 2,830,000 State government employees and some 7,610,000 local government employees.[1] This case and *Broadrick, et al.* v. *The State of Oklahoma, et al.*, No. 71-1639, afford the Court an opportunity to remove the cloud that has been cast by *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), upon the constitutional right of that large and important segment of the population to participate actively in the political life of the country. While the Court when *Mitchell* was decided did not "know whether the number of federal employees will expand or contract" (*id.*, at 102), such employees now have become, and it seems relatively certain that they will continue to be, a large segment of the population. As *Mancuso* v. *Taft*, 341 F. Supp. 574, 576-577 (D.R.I., 1972), observed, after noting that Federal, State and local government employees comprised about 15% of the country's total working force in 1968, "[r]estrictions on the freedom of political expression of such a large portion of the population is a matter of much concern."

Specifically involved in this case is the constitutionality of a sentence in the Hatch Act (53 Stat. 1147, as amended), as codified and reenacted as a part of Title 5 of the United States Code (80 Stat. 403-407, 525-526),

[1] Statistical Abstract of the United States (1972 Ed.), at 399-403, 430-431.

which provides that a covered government employee may not "take an active part in political management or in political campaigns." §§ 1502(a)(3), 7324(a)(2). That phrase is defined to mean "those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President." §§ 1501(5), 7324(a). An exclusion from the prohibition is provided for "political activity in connection with" elections in which "none of the candidates" represents or seeks to represent a party that participated in the immediately preceding presidential election or as to questions (such as constitutional amendments, referendums and approval of municipal ordinances) "not specifically identified with a National or State political party." §§ 1503, 7326. The Act also provides that a covered employee "retains the right to vote as he chooses and to express his opinions on political subjects and candidates." §§ 1502(b), 7324(b).

The Act's prohibition against taking "an active part in political management or in political campaigns" applies to each "employee in an Executive agency" of the Federal government, except those in the Office of the President, the heads and assistant heads of departments, and some (but not all) employees appointed by the President with the advice and consent of the Senate. § 7324(a), (d). It does not apply, however, "to an employee of The Alaska Railroad who resides in a municipality on the line of the railroad in respect to political activities involving that municipality." § 7327(a). It also does not apply, insofar as the Civil Service Commission ("CSC") may by regulation prescribe, to participation by Federal employees in "poli-

tical management and political campaigns involving the municipality or other political subdivision in which they reside," if such municipality or other political subdivision "is in Maryland or Virginia and in the immediate vicinity of the District of Columbia" or is one "in which the majority of voters are employed by the Government of the United States." § 7327(b). Current CSC regulations list some 41 municipalities or political subdivisions in Maryland, 11 in Virginia and 13 located elsewhere as being subject to this exception, and limit the exception to participation "as an independent candidate or on behalf of, or in opposition to, an independent candidate" for office in one of the municipalities or political subdivisions so listed. 5 C.F.R. § 733.124(b) and (c).

The Act's prohibition against taking "an active part in political management or in political campaigns" also applies to each "individual employed by the government of the District of Columbia," except the D.C. Commissioners, the Recorder of Deeds, and those individuals "employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization." § 7324(a), (c) and (d). As is true of Federal employees, the restriction upon the political activities of covered D.C. employees residing in the Maryland or Virginia suburbs is inapplicable, to the extent that the CSC may prescribe, to political management and political campaigns for office in those suburban municipalities or political subdivisions. § 7327(b).

In addition, the Act's prohibition against taking "an active part in political management or in political cam-

paigns" applies to each "State or local officer or employee" whose "principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency," §§ 1501(4), 1502(a), except those who exercise "no function in connection with" such activities, or who are employed "by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization," and governors and lieutenant governors, mayors, elected heads of State and municipal executive departments, and other individuals holding elective office, §§ 1501(4), 1502(c).

A Federal or D.C. employee found to have violated the Act must be permanently removed from his position as an employee, unless the CSC, by unanimous vote, prescribes a suspension from office without pay for 30 days or more. § 7325. If a State or local employee violates the Act, and the CSC determines that the violation warrants his removal from office, the federal grant or loan to the agency involved will be reduced in an amount equivalent to double the employee's annual salary if such removal is not accomplished within 30 days and maintained for at least 18 months. § 1506(a). While the CSC is charged with enforcement of the Act as to covered State and local employees and Federal employees in the "competitive" service, as to Federal employees "excepted" from the competitive service, such as attorneys, the responsibility for enforcement rests with the head of the employing department or agency. 5 C.F.R. § 733.201.

The court below noted that the Act's "[p]rohibitions are worded in generalities that lack precision" so that "[n]o one can read the Act and ascertain what it prohibits" (346 F. Supp., at 582), that the Act "incorporates by reference over 3,000 rulings made by the [Civil Service] Commission between 1886 and 1940" which "have a sweep and indefiniteness that no one would even attempt in these days to defend if analyzed against the strictures of the First Amendment" (*id.*, at 580), that "the administrative actions" of the CSC since 1940, "even if unqualifiedly accepted as the administrative gloss on the Act, still place any federal employee at hazard if he ventures to speak on a political matter since he will not know when his words or acts relating to political subjects will offend" (*id.*, at 582-583)," that "even those most intimately concerned with its enforcement are in doubt and have sought legislative clarification" (*id.*, at 582), and that "[u]ncertainties abound and they will produce excessive caution and stifle words and acts not explicitly prohibited" (*id.*, at 583).

The Commission on Political Activity of Government Personnel, consisting of 12 distinguished members under the chairmanship of Arthur S. Flemming and established by the Congress in 1966 to "make a full and complete investigation and study of the Federal laws which limit or discourage the participation of Federal and State officers and employees in political activity" (80 Stat. 868), reached similar conclusions after investigating the actual understandings of employees regarding what is and what is not prohibited by the Act. Report, Vol. I, at 19-22.

> "Faced with compelling evidence that the existing law unduly confuses and restricts more than 4.5

> million Federal, State, and local public employees, this Commission proposes a new approach. It recommends that Congress eliminate the confusing array of do's and don'ts by clearly defining permitted activities and prohibitions in the statute. The prohibitions would be only those that Congress finds necessary to protect employees against actions that would threaten the integrity, efficiency, and impartiality of the public service." *Id.*, at 21.

"It was the unanimous view of the Commission members . . . that these limits should be clearly and specifically expressed, and that beyond those limits political participation should be permitted as fully as for all other citizens." *Id.*, at 3.

While the full extent of the Act's prohibition against taking "an active part in political management or in political campaigns" is impossible to ascertain, there can be no doubt that the Act restricts the freedom of covered employees to be (or to seek nomination as) candidates for most Federal, State and local elective offices, from supporting or opposing others as candidates for such offices through such activities as fund raising, soliciting votes, public endorsements and public speeches, and from engaging in a wide variety of political party activities. See the current CSC regulations which list such activities as being prohibited by the Act, while noting that the Act's prohibitions are "not limited to" the listed activities. 5 C.F.R. §§ 151.122, 733.122. These restrictions, whatever their extent, apply to the off-duty activities of all covered employees as well as to their on-the-job activities without any distinction.

In general, moreover, the Act's restrictions upon the freedom of government employees to engage in poli-

tical activities, whatever the extent of those restrictions may be, apply without regard either to the nature of the political campaign or to the nature of the employee's job. Whether the political campaign is for local dogcatcher or President of the United States, whether the employee performs janitorial work or fills an important policy position, and whether he deals with the public or is totally obscure, the identical restrictions apply. This generality is subject to exceptions, but those exceptions appear to reflect expediency or happenstance rather than some unifying principle or constancy of purpose.

Thus, all teachers and other educational or research employees of the District of Columbia and of State and local governments are excepted from the Act's prohibitions, but not those employed by the Federal Government and no other non-administrative employees are excepted generally. Employees of The Alaska Railroad are excepted insofar as municipal political activities are concerned, but not otherwise and no other category of employees has an absolute exemption in regard to municipal political activities. The CSC may by regulation dilute or abolish the restrictions against political activities of Federal and D.C. employees residing in the Maryland or Virginia suburbs of the District of Columbia or in a locality in which such employees comprise a majority of the voters, in regard to municipal and other local political campaigns, but not as to State or Federal political campaigns. No such authority is given to the CSC with respect to Federal and D.C. employees residing elsewhere (including the District of Columbia itself) or with respect to any State or local employees. While the heads and assistant heads of Federal departments and some (but not

all) Federal employees appointed by the President with the consent of the Senate are excepted (including the members of the CSC), there is no general exception for Federal employees holding high-level policy-making or non-civil service jobs, the heads of State and local executive departments are not exempted unless those positions are elective, and the Commissioner (or Mayor) and Recorder of Deeds are the only District of Columbia officials exempted.

The Commission on Political Activity of Government Personnel "believe[d] that all the inequalities in the present coverage and enforcement [of the Act] are undesirable." Report, Vol. I, at 25. It particularly criticized the "distinction[s] based on geographic location" of covered employees, as employees living in the favored areas "have a substantial privilege that is denied vast numbers of employees living elsewhere" solely because of the place where they reside. *Id.*, at 24. The Commission also concluded that the Act's distinction between nonpartisan and partisan activities "is Unworkable and Unrealistic." *Id.*, at 22. "A person may be partisan for a person, an issue, or a candidate without having any feeling of identification with one political party or another. A majority of this Commission's members feel there is no such thing as a nonpartisan campaign or a nonpartisan election." *Id.*, at 23. Thus, the Commission recommended, among other things, that the "distinction between local political offices which can be campaigned for and held by Federal employees, and those which cannot, should be based on the nature of the office itself, without reference to a 'partisan' or 'nonpartisan' distinction or to the geographic area where the employee lives." *Id.*, at 4.

We have noted that the Hatch Act itself applies to many State and local, as well as to Federal and D.C., government employees. In addition, many States and local governmental units also have laws restricting the political activities of some of their employees. This is illustrated by the *Broadrick* case which involves the constitutionality of an Oklahoma statute providing that "[n]o employee in the classified service . . . shall, directly or indirectly, . . . in any manner be concerned in soliciting or receiving an assessment, subscription or contribution for any political organization, candidacy or other political purpose," or "be a member of any national, state or local committee of a political party," or be "an officer or member of a committee of a partisan political club," or be "a candidate for nomination or election to any paid public office," or "take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote." 74 Okla. Stat. Ann. § 818 (6th and 7th unnumbered paragraphs). Employees found to have violated the Act must be dismissed from employment, 74 Okla. Stat. Ann. § 818 (8th unnumbered paragraph), and those who "willfully violate" the Act are guilty of a misdemeanor, and may be fined not less than $50.00 nor more than $1,000.00, or imprisoned for not more than six months, or both. 74 Okla. Stat. Ann. § 819.

The Oklahoma Act's prohibition against taking "part in the management or affairs of any political party or in any political campaign" obviously shares much of the vagueness and overbreadth of the Hatch Act's prohibition against taking "an active part in political management or in political campaigns," and involves the additional difficulty of ascertaining what

constitutes an "affair" of a political party. Moreover the Oklahoma statute appears to go even further than the Hatch Act in restricting the political activity of covered employees since any "part," however minute, that they may take in "the management or affairs of any political party or in any political campaign" seems to be prohibited except voting and private expressions of opinion.[2] Thus, all public expressions of political opinions appear to be prohibited (what makes an expression public rather than private is not defined), and even mere membership in a political party may be banned. While Oklahoma's employees "in the classified service" thus are virtually incapacitated politically, some 22 categories of its employees are excluded from the "classified service" and are not subject to those restrictions. 74 Okla. Stat. Ann. §§ 803, 803.1, 803.2, 822. Here, too, there does not appear to be any unifying principle based upon either the nature or level of the position held to explain who is restricted and who is not, and the only apparent distinction based on the nature or level of the political campaigns involved is that candidacy for public office is prohibited only if the officeholder is "paid."

In its 1967 Report (Vol. II, Part IV), the Commission on Political Activity of Government Personnel compiled the then-existing State laws restricting the political activity of State employees, and classified the laws of eight States (including Oklahoma) as being more restrictive than the Hatch Act, those of nine States as being similar to the Hatch Act and the laws of 33 States as being less restrictive than the Hatch Act.

[2] The Government notes (Brief, at 18) that the Congress, in the Hatch Act, eliminated the word "privately" in authorizing expressions of political opinions.

(including 10 that imposed little or no restrictions). We are not aware of any compilation of local ordinances or regulations restricting the political activities of some or all of the employees of a particular county, municipality, local agency or other local political subdivision or body, but they appear to be widespread.[3] Many of these State and local laws and policies, like the Hatch Act and the Oklahoma Act, contain vague, broadsweeping prohibitions, provide seemingly inconsistent exceptions as to the employees covered, and, in limiting the First Amendment rights of covered employees, make no apparent effort to tailor the restrictions so as to do no more than is necessary to meet some compelling need.

This network of broad, vaguely-worded legislation has flourished under the shelter of the "rational basis" standard applied in *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), to uphold the constitutionality of the Hatch Act's restrictions on the First Amendment rights of federal employees.[4]

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[3] See, *e.g.*, *Lay* v. *City of Kingsport, Tennessee*, 454 F.2d 345 (6th Cir., 1972); *Hobbs* v. *Thompson*, 448 F.2d 456 (5th Cir. 1971); *Mancuso* v. *Taft*, 341 F. Supp. 574 (D.R.I., 1972); *Gray* v. *City of Toledo*, 323 F. Supp. 1281 (N.D. Ohio, 1971); *Montgomery* v. *White*, 320 F. Supp. 303 (E.D. Tex., 1969); *Fort* v. *Civil Service Com'n of County of Alameda*, 38 Cal. R. 625, 392 P.2d 385 (1964); *Kinnear* v. *City and County of San Francisco*, 38 Cal. R. 631, 392 P.2d (1964); *City of Miami* v. *Sterbenz*, Fla., 203 So.2d 4 (1967); *De Stefano* v. *Wilson*, 96 N.J. Super. 592, 233 A.2d 682 (1967); *Ivancie* v. *Thorton*, 250 Or. 550, 443 P.2d 612 (1968); *Willis* v. *City of Fort Worth*, Tex., 380 S.W.2d 814 (1964); *Salt Lake City Fire. Fight. Loc. 1645* v. *Salt Lake City*, 22 Utah 2d 115, 449 P.2d 239 (1969).

[4] In a companion decision which merely adopted by reference the reasoning in *Mitchell* on the First Amendment issue, this Court also upheld the constitutionality of the Act's restrictions on States and local employees. *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 142 (1947).

The court below concluded, and we intend to demonstrate, that *Mitchell* "is inconsistent with subsequent decisions delineating First Amendment freedoms" which have "undercut the 'rational basis' test upon which the *Mitchell* analysis of the Hatch Act was based," so as to "place *Mitchell* among other decisions outmoded by passage of time." 346 F. Supp., at 585. This also has been recognized by some other lower Federal and State courts that have invalidated State or local laws because of their overbroad encroachments upon the First Amendment rights of government employees.[5] Other such courts, however, have treated the *Mitchell* decision as being virtually conclusive on the constitutional issue, both in Hatch Act cases[6] and in regard to State and local statutes restricting

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[5] *Hobbs* v. *Thompson*, 448 F.2d 456, 471-475 (5th Cir., 1971); *Mancuso* v. *Taft*, 341 F. Supp. 574, 575-583 (D. R.I., 1972); *Fort* v. *Civil Service Com'n of County of Alameda*, 38 Cal. R. 625, 392 P.2d 385, 388-389 (1964); *Minielly* v. *State*, 242 Or. 490, 411 P.2d 69, 71-78 (1969). Cf. *Montgomery* v. *White*, 320 F. Supp. 303, 304 (E.D. Tex., 1969); *Huerta* v. *Flood*, 103 Ariz. 608, 477 P.2d 866 (1969); *Bagley* v. *Washington Township Hospital District*, 55 Cal. R. 401, 421 P.2d 409 (1966); *Kinnear* v. *City and County of San Francisco*, 38 Cal. R. 631, 392 P.2d 391 (1964); *City of Miami* v. *Sterbenz*, Fla., 203 So.2d 4 (1967); *De Stefano* v. *Wilson*, 96 N.J. Super. 592, 233 A.2d 682 (1967).

[6] *Kearney* v. *Macy*, 409 F.2d 847, 848 (9th Cir., 1969); *Northern Va. Reg. Pk. Auth.* v. *United States Civ. Serv. Com.* 437 F.2d 1346, 1348-1351 (4th Cir., 1971); *Palmer* v. *United States Civil Service Commission*, 297 F.2d 450, 452-455 (7th Cir., 1962); *Fishkin* v. *United States Civil Service Commission*, 309 F. Supp. 40, 43-46 (N.D. Cal., 1969), app. dis. as untimely, 396 U.S. 278 (1970); *Democratic St. Cent. Com. for Montgomery County Md.* v. *Andolshek*, 249 F. Supp. 1009, 1015-1018 (D. Md., 1966); *Gray* v. *Macy*, 239 F. Supp. 658, 660 (D. Ore., 1965), rev'd on other grounds, 358 F.2d 742 (9th Cir., 1966); *Engelhardt* v. *United States Civil Service Commission*, 197 F. Supp. 806, 811-812 (M.D. Ala., 1961), aff'd *per curiam* on basis of opinion below, 304 F.2d 882 (5th Cir., 1962).

political activities of government employees,[7] unless and until overruled expressly by this Court. That view was pithily expressed by the statement of the court below in *Broadrick* that an "inferior court can never 'erode' a decision of the United States Supreme Court."[8]

Therefore, the very existence of the *Mitchell* decision has exerted and, unless overruled by this Court, will continue to exert, a chilling effect upon the exercise by millions of government employees of their First Amendment rights to participate actively in the political processes that are central to our system of government. The time has come for the Court to make entirely clear that the fundamental right of government employees to participate in the political process, like that of other citizens, cannot be restricted except insofar as is necessary to promote a compelling state interest, and then only to the least drastic extent possible and by clear and precise language.

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[7] *Lay* v. *City of Kingsport, Tennessee*, 454 F.2d 345, 347 (6th Cir., 1972); *Stack* v. *Adams*, 315 F. Supp. 1295, 1297 (N.D. Fla., 1970); *Wisconsin State Emp. Ass'n* v. *Wisconsin Nat. Resources Bd.*, 298 F. Supp. 339, 350 (W.D. Wis., 1969); *Swinney* v. *Untreiner*, Case, No. 42,594 (Fla. Sup. Ct.; Opinion filed January 22, 1973); *Salt Lake City Fire Fight. Loc. 1645* v. *Salt Lake City*, 22 Utah 2d 115, 449 P.2d 239, 240 (1969). Cf., *Gray* v. *City of Toledo*, 323 F. Supp. 1281, 1284-1286 (N.D. Ohio, 1971); *Deeb* v. *Adams*, 315 F. Supp. 1299 (N.D. Fla., 1970); *Johnson* v. *State Civil Service Department*, 280 Minn. 61, 157 N.W.2d 747, 751 (1968); *Willis* v. *City of Fort Worth*, Tex., 380 S.W.2d 814 (1964).

[8] *Broadrick* v. *State of Oklahoma ex rel. Okl. Person. Bd.*, 338 F. Supp. 711, 716 (W.D. Okla., 1972).

SUMMARY OF ARGUMENT

In 1947, this Court rejected a contention that the Hatch Act violated the First Amendment. *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947). Although conceding that the Act restricted political speech and associations of government employees, a 4-3 majority of the Court concluded that the Act should be upheld because it has a rational relationship to a proper governmental purpose, and perhaps also because government employment is a privilege rather than a right.

Since 1947, however, this Court in numerous decisions has repudiated the notion that encroachments upon the First Amendment rights of government employees can be justified on the ground that employment is a privilege, not a right. Furthermore, this Court has firmly established that the "rational basis" test applied in *Mitchell* is not applicable when First Amendment freedoms and other fundamental constitutional rights are involved. Rather, legislation restricting freedom of speech and association, and other fundamental rights, must be necessary to further a compelling governmental interest. The Court has emphasized that the application of this test, and the close and exacting examination of legislation which it requires, is particularly important when—as is true under the Hatch Act—participation in political activities is restricted. It "can hardly be doubted that the constitutional guarantee has its fullest and most urgent application to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971). Hence, under present-day constitutional doctrines such legislation cannot be overbroad, even if otherwise justified. It must be limited to the least

drastic available means of achieving a compelling governmental interest.

This Court, therefore, should overrule *Mitchell* because, as the court below concluded, "it is inconsistent with subsequent decisions delineating First Amendment freedoms," which have "undercut the 'rational basis' test upon which the *Mitchell* analysis of the Hatch Act was based," and "place *Mitchell* among other decisions outmoded by passage of time." 346 F. Supp., at 583. The Court should do so even if it holds, as we think it should, that the Hatch Act's prohibition against taking "an active part in political management or in political campaigns" is void for vagueness—an issue not reached in *Mitchell*. Otherwise, that decision and its endorsement of the "rational basis" approach will continue to have a chilling effect upon the exercise by government employees of First Amendment speech and association, as it has in the past, by inhibiting inferior courts and legislative bodies from subjecting existing or proposed legislation restricting the political activities of government employees to the rigorous scrutiny required by modern constitutional doctrines.

The Hatch Act's prohibition against covered government employees taking "an active part in political management or in political campaigns" cannot pass muster if subjected to such scrutiny. The Act is shot through with exceptions and exemptions that in themselves undercut either the allegedly compelling nature of the Act's purposes asserted by the Government, or the existence of such purposes. Moreover, the Act's prohibition plainly is overbroad. The Government has not even attempted to undertake its burden of demonstrating that less drastic means of achieving those as-

serted purposes are not available, and it obviously is not impossible to draft legislation which, in narrowly defined and precise terms, prohibits government employees from neglecting their official duties so as to engage in political activities and from utilizing their government positions either to obtain or to afford political favoritism or to advance personal political interests. Indeed, some such legislation already exists.

The overbreadth of the Hatch Act's prohibition is emphasized by the fact that it applies equally to political activities engaged in by a covered employee in his capacity as an employee and to those engaged in by him in his capacity as a private citizen, as while off duty, and does not otherwise depend upon whether the political activities in question affect the employee's performance of his duties as a government servant or are related to those duties. In *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), this Court made clear that a government employee is to be considered as a member of the general public, and is no more subject to governmental restrictions than other citizens, insofar as political activities unrelated to the performance of his duties as a government employee are concerned. The overbreadth of the Act's prohibition is further emphasized by the fact that, with some irrational exceptions, no distinction is made in regard to the nature of the political campaign or the political office involved. It may apply without regard to whether the political campaign is for the most insignificant local office or the Presidency of the United States, or as to whether the employee involved fills a lowly industrial-type job or an important policy-making position. And, it may apply even though the political campaign or election involved is one in which the government employee has a stake which does not differ from that of other citizens.

The overbreadth of the prohibition against taking "an active part in political management or in political campaigns" cannot be avoided by a narrowing judicial construction without rewriting the statute. Hence, that prohibition is invalid on its face and in its entirety.

The Hatch Act's prohibition against taking "an active part in political management or in political campaigns" also is overly vague, as well as being overbroad, as the court below concluded. Its terms are "so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application . . . ." *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926). While we do not undertake to discuss this issue in detail, in view of the extensive discussion in the opinion below and in the Brief for Appellees, we do undertake to demonstrate that the arguments made by the Government in its Brief, when closely analyzed, compound, rather than disperse, the uncertainties inherent in the broad, indefinite statutory language, and thus confirm the Act's unconstitutional vagueness.

ARGUMENT

In *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), a 4-3 majority of this Court held that the Hatch Act's prohibition against covered government employees taking "an active part in political management or in political campaigns" did not violate the First Amendment to the Constitution.[9] While conced-

[9] While the *Mitchell* case directly involved the application of that prohibition to federal employees, the companion *Oklahoma* decision relied upon *Mitchell's* reasoning in upholding its application to State and local government employees. See fn. 4, p. 15, *supra*. Our demonstration herein that *Mitchell* is no longer good law also applies to that case.

ing that the Act results in "a measure of interference . . . with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments" (*id.*, at 95),[10] and accepting the "argument that political neutrality is not indispensable to a merit system for federal employees" (*id.*, at 100), the majority concluded that for "regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service" (*id.*, at 101) so that the "determination of the extent to which political activity shall be regulated lies primarily with Congress" and the "Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power" (*id.*, at 102). Mr. Justice Black, in dissent, urged unsuccessfully that "laws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public" (*id.*, at 110). Mr. Justice Douglas agreed (*id.*, at 124, 126), and urged particularly the failure of the Act to make any distinc-

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[10] The majority also noted that "if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment," but pointed out that the "objections under the Amendments are basically the same" (330 U.S., at 95). Of course, it is also well established that the First Amendment is applicable to State and local governments through the Fourteenth Amendment. *E.g.*, *Elfbrandt* v. *Russell*, 384 U.S. 11, 18 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277 (1964); *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963). Hence, this case and the *Broadrick* case arising out of an Oklahoma statute involve similar issues insofar as the First Amendment is concerned.

tion between "industrial" type employees and those engaged in administrative work.

Hence, as the court below and some other lower Federal and State courts have recognized (see p. 16, *supra* and the cases cited in fn. 5 thereto), the majority of this Court in *Mitchell* applied the "rational basis" test in upholding the power of the Congress through the Hatch Act to restrict the First Amendment rights of government employees. The majority also may have relied to some extent upon the notion that government employment is a "privilege" which may be conditioned upon the relinquishment of constitutional rights (see 330 U.S., at 99, fn. 34). But as those courts also recognized and as we expect to demonstrate, in the 25 years since *Mitchell* was decided this Court in a long series of cases has repudiated the "privilege" doctrine and has firmly established that legislation encroaching upon First Amendment and other constitutional rights is not measured by the "rational basis" test, but rather must be closely scrutinized by the courts to determine whether such encroachments are necessary to serve a compelling state interest. To survive that test, the legislation must not only be justified by a compelling interest, but also must not be overbroad and must be limited to the least drastic means necessary to protect that interest. In addition, more rigorous standards of clarity are required. We also expect to demonstrate that the Hatch Act's sweeping prohibition against taking "an active part in political management and in political campaigns" cannot pass muster under those modern constitutional doctrines, and we think that is also true of comparable State and local laws such as the Oklahoma statute before the Court in *Broadrick*.

A. The Mitchell Decision Should Be Expressly Overruled.

1. *The Right-Privilege Distinction Has Been Repudiated.* We do not think it necessary to expend much time in demonstrating that the Court has repudiated any notion that the deprivation of the First Amendment rights of government employees can be justified on the ground that government employment is a "privilege" rather than a "right." The Government does not appear to place any reliance upon that discredited doctrine, and in *Perry* v. *Sindermann,* 408 U.S. 593, 597 (1972), this Court recently summarized the now established view regarding this matter, citing many of its relevant decisions, as follows:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall,* 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.
>
> We have applied this general principle to denials of tax exemptions, *Speiser* v. *Randall, supra,* unemployment benefits, *Sherbert* v. *Verner,* 374 U.S. 398, 404-405, and welfare payments, *Shapiro* v. *Thompson,* 394 U.S. 618, 627 n. 6; *Graham* v. *Richardson,* 403 U.S. 365, 374. But, most often,

we have applied the principle to denials of public employment. *United Public Workers* v. *Mitchell,* 330 U.S. 75, 100; *Wieman* v. *Updegraff,* 344 U.S. 183, 192; *Shelton* v. *Tucker,* 364 U.S 479, 485-486; *Torcaso* v. *Watkins,* 367 U.S. 488, 495-496; *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 894; *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 288; *Baggett* v. *Bullitt,* 377 U.S. 360; *Elfbrandt* v. *Russell,* 384 U.S. 11, 17; *Keyishian* v. *Board of Regents,* 385 U.S. 589, 605-606; *Whitehill* v. *Elkins,* 389 U.S. 54; *United States* v. *Robel,* 389 U.S. 258; *Pickering* v. *Board of Education,* 391 U.S. 563, 568. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering* v. *Board of Education, supra,* with *Shelton* v. *Tucker, supra.*"

See, also, *Board of Regents* v. *Roth,* 408 U.S. 564, 571 n. 9 (1972).

In short, the notion that a government may deny First Amendment or other constitutional rights to its employees because government employment is a "privilege" has been completely exploded in recent years. Indeed, as the citation of *Mitchell* in the above quotation indicates, there is language in the majority opinion in that case inconsistent with that notion, even though at another point the *Mitchell* majority seemed to place some reliance upon it. Thus, in its seminal opinion (on this point) in *Wieman* v. *Updegraff,* 344 U.S. 183, 191-192 (1952), the Court pointed to the assertion in *Mitchell* "that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' 330 U.S., at 100."

2. *The "Rational Basis" Test Has Been Repudiated and the "Compelling Interest" Test Applied When First Amendment Freedoms Are Involved.* We think it equally clear that the decisions of this Court in recent years have established beyond reasonable question that the "rational basis" test does not apply in determining the constitutionality of legislation that encroaches upon First Amendment or other fundamental constitutional rights. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice . . . in this highly sensitive constitutional area . . . ." *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963). So, too, the Court explicitly rejected a contention that "a mere showing of a rational relationship" to "admittedly permissible state objectives" would justify a legislative classification penalizing the exercise by some citizens of "a constitutional right," since "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969).[11] Thus, recent "decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' " *Williams* v. *Rhodes,* 393 U.S. 23, 31 (1968).

The application of these principles, and the "close and exacting examination" of challenged legislation

[11] To the extent that the decisions rest upon the fact that the citizens restricted by State legislation from exercising fundamental constitutional rights have been deprived of the equal protection of the laws, similar requirements are imposed upon the Federal government by the Due Process Clause of the Fifth Amendment. *Shapiro* v. *Thompson, supra* at 641-642.

which they require,[12] are particularly important when—as here—the right of some citizens to participate freely in political affairs is restricted. "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. That right was enshrined in the First Amendment of the Bill of Rights." *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966). And, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971). "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Kramer* v. *Union School District, supra* at 626. "The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality" and a "more exacting standard obtains" requiring that the legislation be necessary to further "a compelling state interest . . ." *Id.,* at 628, 633.

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[12] *Kramer* v. *Union School District,* 395 U.S. 621, 626 (1969).

In *Kramer*, the Court applied these principles in striking down a statute imposing property qualifications upon the right to vote. Accord, *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Ciprano* v. *City of Houma*, 395 U.S. 701 (1969). They have been applied in invalidating laws making the right to vote dependent upon the payment of poll taxes, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966), or imposing excessive durational requirements upon eligibility to vote, *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). They have been applied to invalidate a law prohibiting electioneering or the soliciting of votes on election day, *Mills* v. *Alabama, supra;* unnecessarily severe restrictions upon the right of independent candidates to be placed on the ballot, *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); the refusal to seat an elected candidate because of his public statements, *Bond* v. *Floyd*, 385 U.S. 116 (1966); and libel laws too broadly restricting public criticism of candidates for public office, *Monitor Patriot Co.* v. *Roy, supra*, as well as of sitting public officials, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

In *Bullock* v. *Carter*, 405 U.S. 134, 142-144 (1972), the Court applied these "compelling interest" principles to a law restricting eligibility to be a candidate in a primary to select a nominee for public office, and pointed out that restrictions on the right of individuals to be a candidate for public office necessarily also restrict voters generally in the selection of the candidates for whom they desire to cast their votes. *Cf. Turner* v. *Fouche*, 396 U.S. 346, 362-364 (1970). And, these principles have been applied to invalidate laws inhibiting the freedom to associate with others for political purposes. *Healy* v. *James*, 408 U.S. 169 (1972); *Bates* v. *Little Rock*, 361 U.S. 516

(1960); *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958). The Court has recognized the established nature of these principles in decisions rendered as late as its current term. *Roe* v. *Wade,* — U.S. —, 41 U.S.L.W. 4213, 4226 (1973); *Goosby* v. *Osser,* — U.S. —, 41 U.S.L.W. 4167, 4169 (1973).[13]

As noted in our Statement of the Case (p. 10, *supra*), whatever may be the full extent of the Hatch Act's prohibition, there can be no doubt that the covered government employees are subject to restrictions against becoming candidates for public office, publicly endorsing or speaking in behalf of others who campaign for office, solicitation of votes, and taking an active role in political parties or organizations. In short, they are subjected to restrictions upon participation in the political process that this Court, in many decisions since Mitchell, has held must be demonstrated to be necessary to serve a compelling public interest before the encroachment upon the First Amendment freedoms of speech and association can be justified.[14]

Moreover, any possible basis for a contention that laws restricting the political activities of government employees somehow constitute an exception to the application of the strict "compelling interest" standard, so that *Mitchell's* application of the "rational basis" standard should continue to be recognized as good law, has been destroyed by a number of decisions not yet

[13] We have not attempted, of course, to list all the many cases applying these principles, or all of the situations in which they have been applied, in recent years.

[14] This is also true of the Oklahoma employees subject to the statute of that State at issue in the *Broadrick case.* See pp. 13-14, *supra.*

mentioned. Those decisions have directly applied the "compelling interest" principles discussed above in invalidating a variety of restrictions upon the political activities of government employees. They include laws barring government employment to members of "subversive" organizations, *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), excluding members of the armed services domiciled in a State from eligibility to vote in State elections, *Carrington* v. *Rash,* 380 U.S. 89 (1965), and excluding residents of a "federal enclave" within a State from eligibility to vote in State elections, *Evans* v. *Cornman,* 398 U.S. 419 (1970), and school board action resulting in the dismissal of a teacher for the "exercise of his right to speak on issues of public importance," *Pickering* v. *Board of Education,* 391 U.S. 563, 574 (1968); *cf., Wood* v. *Georgia,* 370 U.S. 375 (1962).

We submit, therefore, that the court below clearly was correct in concluding that *Mitchell* "is inconsistent with subsequent decisions delineating First Amendment freedoms," which have "undercut the 'rational basis' test upon which the *Mitchell* analysis of the Hatch Act was based," and "place *Mitchell* among other decisions outmoded by passage of time." 346 F. Supp., at 585.

3. *Legislation Affecting First Amendment Freedoms Must Not Be Overbroad.* Closely related to the "compelling interest" doctrine is the overbreadth doctrine that "has recently come to the center of first amendment adjudication." Note, *The First Amendment Overbreadth Doctrine,* 83 H.L.R. 844, 846 (1970). That doctrine helps assure that the legislation on its face in fact is necessary to serve a compelling governmental interest, rather than going further than necessary so as to include within its sweep some activities that under

the First Amendment may not constitutionally be regulated as well as some that may. "The objectionable quality of . . . overbreadth does not depend upon the absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application .... These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432-433 (1963).

Thus, in "a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means of achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). Even a "clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned* v. *City of Rockford,* 408 U.S. 104, 114 (1972).

To determine whether the sweep of a statute is overbroad, the Court normally must look to the face of the statute rather than to a particular application. "Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either,

until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights." *Gooding* v. *Wilson,* 405 U.S. 518, 521 (1972), quoting from the opinion of White, J., in *Coates* v. *City of Cincinnati,* 402 U.S. 611, 619-620 (1971).[15]

The majority opinion in *Mitchell* gave no consideration to the overbreadth doctrine, and perhaps understandably so in view of the utilization of the "rational basis" test applicable to economic legislation rather than the "compelling interest-necessity" test which more recent decisions have firmly established where legislation encroaching upon First Amendment freedoms are involved. Thus, the *Mitchell* majority limited its consideration of the Hatch Act to its application to a single employee. 330 U.S., at 92. In this regard also, therefore, it has been outmoded by the passage of time.

4. *The Mitchell Decision Should Be Reconsidered in This Case.* The Government Brief (p. 61) contains the rather astonishing suggestion that there "is no occasion for re-examining" the *Mitchell* decision in this case. Such a re-examination perhaps would not strictly

[15] The overbreadth doctrine has, of course, been discussed and applied in many other decisions of this Court in recent years. Some of them are *Police Department of Chicago* v. *Mosely,* 408 U.S. 92, 101-102 (1972); *Dunn* v. *Blumstein,* 405 U.S. 330, 342-343 (1972); *United States* v. *Robel,* 389 U.S. 258, 265-268 (1967); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 609 (1967); *Elfbrandt* v. *Russell,* 384 U.S. 11, 18-19 (1966); *Dombroski* v. *Pfister,* 380 U.S. 479, 486-487 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 508, 512-517 (1964). See, generally, Note, *The First Amendment Overbreadth Doctrine, supra.*

be necessary if this Court decides that the Hatch Act's prohibition is void for vagueness by reason of its incorporation of the pre-1940 decisions of the CSC since, as the court below noted (346 F. Supp., at 580, 585), that issue was not reached in *Mitchell*. But the Government, of course, argues that the Act is not unconstitutionally vague, and the court below grounded its decision upon the overbreadth and chilling effect of the statute upon its face (346 F. Supp., at 583-585) as well as upon vagueness. In doing so, that court expressly concluded that *Mitchell* should not be "considered binding" because subsequent decisions "which developed the 'least restrictive alternative' test for governmental incursions into the area of free speech, undercut the 'rational basis' test upon which the *Mitchell* analysis of the Hatch Act was based" (346 F. Supp., at 585).

The Government itself (Brief, at 53-57) has recognized the necessity of attempting to meet the overbreadth argument, and in arguing (Brief, at 57-61) that the statute nonetheless should not be considered on its face it seeks in effect to rely upon the "reasonably related" (Brief, at 60) or "rational basis" test that underpinned *Mitchell*. This Court could, of course, readopt the *Mitchell* reasoning and reaffirm that decision after re-examination, although we submit that it could not do so consistently with the many decisions we have discussed above. But however that may be, we do not see how the Court can avoid a re-examination of *Mitchell* in view of the decision below and the arguments made here, unless it limits its decision to a holding that the statutory provision in question is void on its face for vagueness.

Moreover, even if that provision is held to be void for vagueness as we think it should (see pp. 48-54, *infra*), we urge the Court to re-examine Mitchell and discard its outmoded "rational basis" approach to legislation restricting the political speech and associations of government employees. While some lower Federal and State courts have recognized that *Mitchell* no longer can be regarded as controlling in view of subsequent developments in the law, others have regarded that decision as being decisive until expressly overruled by this Court. See pp. 16-17, *supra*. And, if the Congress should consider new legislation, it would be faced with similar uncertainty as to whether a mere "rational basis" will suffice or whether it must precisely tailor any such legislation so as to adopt only the least drastic alternative necessary to serve a compelling governmental interest. In short, the *Mitchell* decision itself has a chilling effect upon First Amendment freedoms, as long as it continues formally unreversed, by inhibiting lower courts and legislative bodies from affording existing and proposed laws restricting political activities of government employees the rigorous scrutiny that present-day constitutional doctrines require. Assuming that we are correct in our view that *Mitchell* no longer reflects prevailing constitutional doctrines, no purpose will be served by delay in overruling that decision other than to further delay the necessary re-examination of the manifold legislation—Federal, State and local—that now restricts the political activities of millions of government employees. *Cf., Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967).

In *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967), this Court "conclude[d] that policemen, like teachers

and lawyers, are not relegated to a watered-down version of constitutional rights." By giving *Mitchell* the burial it deserves in this case and in the *Broadrick* case,[16] this Court can go far towards assuring that government employees generally—including many policemen, teachers and lawyers—"are not relegated to a watered-down version of constitutional rights" that are the most fundamental to our system of government—the First Amendment rights to actively participate in the political process through speech, association with others, and political campaigning, generally.

B. The Hatch Act Is Not Necessary to Protect A Compelling Governmental Interest and Is Overbroad.

The Government urges (Brief, at 9-11) that the Hatch Act's prohibition against covered government employees taking "an active part in political management or in political campaigns" serves four objectives: it assertedly (1) "diminishes the likelihood that the

[16] The *Broadrick* case directly involves the issue of whether the *Mitchell* approach, or modern constitutional doctrines, should be applied to State and local statutes regulating political activities. The Oklahoma statutory provisions there involved seem to be as vague as the Hatch Act's provisions involved in this case (see pp. 13-14, *supra*) so that the decision in that case also possibly could be limited to the vagueness issue. See, *e.g.*, *Mancuso* v. *Taft*, 341 F. Supp. 574, 582 (D.R.I., 1972); *Gray* v. *City of Toledo*, 323 F. Supp. 1281, 1288-1289 (N.D. Ohio, 1971); *Huerta* v. *Flood*, 103 Ariz. 608, 447 P.2d 866, 868-869 (1969); and *City of Miami* v. *Sterbenz, Fla.*, 203 So.2d 4 (1967), which held similar State or local statutes to be unconstitutionally vague. But the considerations discussed above also suggest that the Court make clear in that case that the "rational basis" approach of Mitchell no longer has any relevance to the constitutionality of State and local legislation restricting the political activities of government employees.

employee will allow partisan political predilections to interfere with the impartial execution of the government's business in accordance with policies dictated by Congress," (2) "makes it impossible for the party in power to turn the federal civil service into a useful instrument for affecting the outcome of elections," (3) prevents erosion of public confidence in the impartial administration of the federal government," and (4) "serves to assure that government employees will not be or feel themselves compelled to engage in unwanted partisan political activities in order to curry favor with their superiors and enhance their prospects for continued employment or for advancement." Only the second such asserted objective is claimed to have been voiced in the Congress, however, and this Court in *Mitchell* referred to the Act as being rationally related to the promotion of the efficiency of the government service (330 U.S., at 96-99), while recognizing "that political neutrality is not indispensable to a merit system for federal employees . . ." (330 U.S.,at 100).

We do not question the interest of the Federal government, or of a State or local government, in assuring that its employees do not neglect their official duties so as to engage in political activities (or for other reasons) and do not utilize their government positions either to obtain or to afford political favoritism or to advance personal political interests. Narrowly drawn and precisely worded legislation tailored to fit those objectives and to go no further very likely is, we believe, within the power of Congress to enact. But the Hatch Act goes far beyond what is necessary in that regard, and on the other hand, is shot through with exceptions, exemptions and inconsistencies that under-

cut any assertion that the interests it serves are compelling.[17]

1. *Necessity To Serve A Compelling Interest.* The issue as to whether a statute is necessary to serve a compelling governmental interest and the issue as to whether it is overbroad, often involve similar considerations. If a statute goes further than is necessary to serve a compelling government interest, it obviously is overbroad. The issues are not identical, however, so we will treat them separately. The "compelling interest" test is not a "mathematical formula," but rather "emphasizes a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes." *Dunn* v. *Blumstein,* 405 U.S. 330, 342-343 (1972).

In making this scrutiny it is significant not only that a statute goes too far in the light of its asserted purpose (overbreadth), but also that it does not go far enough if that purpose truly constitutes a compelling interest. Thus, in *Dunn,* the asserted purpose of a durational residency requirement on eligibility to vote, in limiting the vote to those knowledgeable about the issues involved in State elections, was belied by the fact that longtime residents who were uninformed about those issues were not disqualified. *Id.,* at 357-360. An alleged compelling necessity to prohibit picketing of schools in order to prevent disruption of classes was undermined

[17] The Oklahoma statute involved in the *Broadrick* case appears to go even further in the scope of its prohibitions on political activities of covered employees, and is also riddled with exceptions. See pp. 13-14, *supra.* Hence, that statute almost certainly must fall if the Hatch Act is invalid.

by an exception for picketing in connection with labor disputes, in *Police Department of Chicago* v. *Mosely*, 408 U.S. 92, 100-102 (1972). In *Bullock* v. *Carter*, 405 U.S. 134, 148-149 (1972), Mr. Chief Justice Burger for this Court rejected a contention that a filing fee required of candidates in primaries was justified as being necessary to serve a compelling state interest in defraying the cost of elections, in part because if that were so a filing fee also would have been required of candidates in general elections. So, too, whether "classifications allegedly limiting the franchise to those resident citizens 'primarily interested' deny those excluded equal protection of the laws depends, *inter alia*, on whether all those excluded are in fact substantially less interested or affected than those the statute includes." *Kramer* v. *Union School District*, 395 U.S. 621, 632 (1969). See, also, *Cipriano* v. *City of Houma*, 395 U.S 701, 704-706 (1969).

We submit that the purported necessity of the Hatch Act to serve the objectives asserted by the Government, and the allegedly compelling nature of those objectives, also are undermined by the exclusions and partial exemptions from the Hatch Act. See pp. 11-12, *supra*. For example, the purported objectives of diminishing the likelihood that government employees will "allow partisan political considerations to interfere with the impartial execution of the government's business in accordance with policies dictated by Congress" and in preventing erosion of "public confidence in the impartial administration of the federal government" must be either illusory or without compelling force in view of the exclusion of the heads and assistant heads of departments—some of the persons short of the President who have the most power and the most opportunity and

often the most motivation to "allow partisan political considerations to interfere with the impartial operation of the government's business in accordance with policies dictated by Congress" and thus to erode "public confidence in the impartial administration of the federal government."

If the objective is to avoid turning federal employees "into a useful instrument for affecting the outcome of elections," or if that objective is compelling, why is it that the restrictions on the political activities of federal employees are relaxed in regard to the very elections in which they might reasonably be expected to have the greatest influence—local elections in the Washington and Virginia suburbs of the District of Columbia and in other localities where federal employees constitute more than half the voters? If restrictions on the political activities of "industrial" or non-policy making employees are necessary to serve any of the purported objectives, why is that not so for employees of The Alaska Railroad insofar as municipal elections are concerned, or of teachers and researchers employed by the District of Columbia or by State or local governments (but not those employed by the United States) in regard to all elections?

This is not to say, of course, that the Hatch Act could be rendered constitutional merely by removing its exemptions or exclusions, or that that should be done. The statutory overbreadth, which we discuss next, is far more serious in its impact upon the freedom of government employees to engage in political activities. We submit, however, that the exclusions and exemptions, as well as the overbreadth, are revealing of the fact that the Congress did not in enacting the Hatch

Act truly tailor that statute to fit compelling governmental objectives.

2. *Overbreadth.* As we have noted (p. 31, *supra*), the "breadth of legislative abridgment [of First Amendment freedoms] must be viewed in the light of less drastic means of achieving the same basic purpose." Moreover, it "plainly is incumbent upon the" Government "to demonstrate that no alternative forms of regulations would combat such abuses without infringing First Amendment rights." *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963). See also, *e.g.*, *Dunn* v. *Blumstein*, *supra* at 343; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 517 (1964). The Government's Brief, in its discussion of the overbreadth issue (pp. 53-57), makes no attempt to meet that burden.[18] In any event, it would not seem to be an impossible task to frame legislation plainly and specifically prohibiting employees from basing their actions for the government on political considerations rather than on the policies established by Congress, or prohibiting the giving or seeking of employment or promotion for political reasons, or prohibiting the coercion of subordinate employees by their superiors for political purposes. For example, another provision of the

[18] The Government seeks to make a distinction between what it refers to as "procedural" overbreadth and "substantive" overbreadth, equates the former with the vagueness issue and, although it concedes that the statute may be overbroad even if it is not void for vagueness, somehow concludes that the "substantive" overbreadth issue is not before the Court and should not be considered. We think it plain, however, that the Act, even if construed in the manner urged by the Government, imposes substantial limitations upon the political activities of covered government employees (see p. 10, *supra*), and thus that the issue of whether those limitations go further than the Constitution permits ("substantive" overbreadth) is ripe for consideration.

Hatch Act which is not in issue prohibits a covered employee from using "his official authority or influence for the purpose of interfering with or affecting the result of an election." 5 U.S.C. § 7324(a)(1). See, also, 5 U.S.C. §§ 1502(a)(1) and (2), 7321, 7322, and 7323; 18 U.S.C. §§ 594, 595, and 598-607.[19]

Perhaps it might be simpler from an administrative point of view to prohibit government employees from taking an active part in politics, but that is not the criterion. The fact that "special problems may be involved in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes" did not justify Texas in creating in effect a conclusive presumption that persons in the military service who moved into that State did not become domiciliaries, thus freezing them out of the right to vote, rather than developing "more precise tests to determine the bona fides of an individual claiming to have" become a domiciliary. *Carrington* v. *Rash*, 380 U.S. 89, 95, 96 (1965). See, also, *Stanley* v. *Illinois*, 405 U.S. 645 (1972). We think that legislation which in effect creates a conclusive presumption that government employees who actively take part in politics will allow that fact to affect the performance of their governmental duties, utilize it to gain promotion, etc., is equally impermissible.

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[19] So, too, uncontested provisions of the Oklahoma statute involved in the *Broadrick* case prohibit such things as discrimination in employment because of "political . . . opinions," the use of "official authority or influence" to secure employment or promotion or to influence "the vote or political action of any person," the giving, receipt or solicitation of money or other valuable consideration on account of employment or promotion, etc. 74 Okla. Stat. Ann § 818 (first five unnumbered paragraphs).

The overbreadth of the Hatch Act's prohibition against taking "an active part in political management or in political campaigns" is emphasized by the fact that it applies to the covered employees' political activities while off duty or on leave of absence as well as while on the job, and does not otherwise make any distinction between political activities engaged in by an employee in his capacity as a citizen and those done in his capacity as a government servant (as, *e.g.*, whether he endorses a candidate merely in his own name or also by reference to his government position), or as to whether or not his political activities in fact compromise his position, affect his performance or are related to his duties as a government servant. The overbreadth of the Act in that regard under modern constitutional standards is demonstrated, we believe, when considered against *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), and *Wood* v. *Georgia,* 370 U.S. 375 (1962).

In *Pickering,* this Court set aside a school board's dismissal of a teacher from employment for sending a letter to a newspaper criticizing actions of the board and its superintendent in connection with the handling of bond issues and the allocation of financial resources —matters of political controversy in the community. In so doing, the Court stated, among other things, that:

> "What we have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the

school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." 391 U.S., at 572-573.

Similarly, in *Wood*, this Court reversed a contempt conviction of a Georgia county sheriff for making a public statement criticizing a grand-jury instruction in connection with a current political controversy. Among other things, this Court rejected a contention that "because the petitioner is the sheriff of Bibb County and thereby owes a special duty and responsibility to the court and its judges, his right to freedom of expression must be more severely curtailed than that of an average citizen." 370 U.S., at 393. That contention was rejected "under the circumstances of this case" because the statement was made by the petitioner in his capacity as a private citizen rather than in his capacity as sheriff, and there was "no evidence that the publications interfered with the performance of his duties as sheriff or with his duties, if he had any, in connection with the grand jury's investigation." *Id.*, at 393-394.

The application of those decisions to the Hatch Act's prohibition, which applies without regard to whether the prohibited political activities are taken by an employee in his capacity as an employee or in his capacity as a private citizen and without regard to whether there is any evidence that the political activities interfered with the performance of his duties as an employee, seems plain. This is pointed up, moreover, by the decision of the Fifth Circuit in *Hobbs* v. *Thompson*, 448 F.2d 456 (5th Cir., 1971). In invalidating for overbreadth a similar prohibition in a city ordinance

prohibiting employees of the city fire department from taking "an active part in any primary or election . . . or prominently identifying themselves in a political race with or against any candidate for office," the Fifth Circuit stated that "as *Pickering* teaches us, where the political activities of a public employee are unrelated to the performance of his duties he is to be treated for purposes of adjudicating his First Amendment rights as a 'member of the general public.' " *Id.*, at 475.[20] See, also, *Mancuso* v. *Taft*, 341 F. Supp. 574, 580 (D.R.I., 1972); *De Stefano* v. *Wilson*, 96 N.J. Super. 592, 233 A.2d 682, 687 (1967).

The overbreadth of the Hatch Act in this regard is further emphasized by the fact that it makes no attempt, even by the use of rough categories, to relate its restrictions upon political speech and associations to the job performed by a covered employee. For example, those restrictions are as applicable to industrial-type workers, such as the "roller" or mechanic in a government mint who was involved in the *Mitchell* case, even though it is virtually impossible that their job performance could be influenced by political considerations, as to policy-making or administrative employees.[21] While we do not think that such rough categorization would be sufficient to save the Act under present-day constitutional standards, its absence vividly demonstrates the Act's failure even to attempt to comply with those standards.

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[20] The Fifth Circuit first concluded that the "rational basis" approach of the *Mitchell* decision has been eroded by subsequent decisions of this Court and should not be followed. 448 F.2d, at 471-474.

[21] In 1970, the Federal government employed about 1,980,000 white collar workers and about 575,000 blue collar workers. Statistical Abstract of the United States (1972 Ed.), at 404.

The overbreadth of the Act's prohibition against taking "an active part in political management or in political campaigns" also is emphasized by the fact that, with some irrational exceptions, no distinction is made in regard to the nature of the political campaign or political office involved. That prohibition is equally applicable to all campaigns or elections for Federal offices, for State offices and for local offices, except for "non-partisan" elections and a partial exemption for some (but not nearly all) of the covered employees, in regard to local elections.[22] As we said in our Statement of the case (p. 11, *supra*), whether the political campaign is for local dogcatcher or President of the United States, and whether the employee performs janitorial work or fills an important policy position, the identical restrictions may apply.

In *Evans* v. *Cornman,* 398 U.S. 419 (1970), this Court held that Maryland could not disqualify residents of a "federal enclave" (the grounds of the National Institute of Health) located in that State from eligibility to vote in elections held in the State. In so doing, the Court pointed out that those persons are subject, with minor exceptions, to the laws of the State (*id.,* at 424-426), and that: "In nearly every election, federal, state, and local, for offices from the Presidency to the school board, and on the entire variety of

[22] The manner in which the partial exemption as to some employees for local elections undercuts the purported compelling nature of the asserted objectives of the Act, is noted at pp. 38-39, *supra.* This is also true of the exception for so-called "non-partisan" elections. As the Commission on Political Activity of Government Personnel pointed out, that distinction is unworkable and unrealistic, since one's commitment to a person, issue or candidate is not necessarily dependent upon identification with a political party. See p. 12, *supra.*

other ballot propositions, appellees have a stake equal to that of other Maryland residents." *Id.*, at 426. This is even more true of Federal employees generally since, unlike those living on federal enclaves, they are fully subject to State and local laws. See p. 3, *supra*. It seems certain, therefore, that a State could not disqualify Federal employees domiciled in the State from eligibility to vote in its elections.

The close connection between the right to vote for a candidate and the right to be a candidate was noted by this Court in *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972); and we think it obvious that a government employee's equal stake in an election comprehends all aspects of that election and of the preceding campaign —the issues, the candidates, the effectiveness of the campaign by one side or the other—and not merely the bare right to vote. See pp. 26-29, *supra*. Thus, a State almost certainly could not deny either residents of federal enclaves or federal employees generally the right to participate actively in State and local political campaigns, any more than the State can deny them the right to vote. And, such invidious discrimination against a group of citizens is no more permissible on the part of the Federal government than it is on the part of a State government. *Shapiro* v. *Thompson*, 394 U.S. 618, 641-642 (1969).

In short, even assuming that there may be some political campaigns and elections as to which the political activities of government employees may be restricted, an indiscriminate prohibition of political activities as to all elections, regardless of the stake of the employees in the election or of its relationship to

his employment, goes far beyond permissible constitutional limits.[23]

For all these reasons, we submit that the Act's prohibition upon covered government employees taking "an active part in political management or in political campaigns" is overbroad, is not limited to the least drastic available alternative, and either is not necessary to serve a demonstrated compelling governmental interest or is not tailored so as to go no further than necessary in view of that interest.

3. *The Scope of the Invalidity.* Perhaps in recognition of the vulnerability of the Hatch Act under current constitutional doctrines, the Government suggests in its Brief (pp. 57-60) that the prohibition against taking "an active part in political management or in political campaigns" should not be invalidated on its face, but rather that if necessary the Court should pick and choose among the various provisions of the CSC regulations purporting to explicate that prohibition. Those regulations, however, merely purport to list some (but not all) of the types of political activities that the CSC considers to be prohibited. Like the statute, moreover, the regulations do not distinguish

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[23] State and local laws have been held invalid by some courts for overbreadth at least in part for their failure to distinguish between the different kinds and levels of political campaigns and elections in prohibiting political activites by government employees. *Fort* v. *Civil Service Com'n of County of Alameda,* 38 Cal. R. 625, 392 P.2d 385, 388 (1964); *Kinnear* v. *City and County of San Francisco,* 38 Cal. R. 631, 392 P.2d 391, 392 (1964); *Bagley* v. *Washington Township Hospital District,* 55 Cal. R. 401, 421 P.2d 409, 416-417 (1966); *Minielly* v. *State,* 242 Or. 490, 411 P.2d 69, 77-78 (1969).

between those political activities that affect the performance of an employee's government duties and those that do not, and generally make no distinctions based on the nature of the employee's government position or of the particular campaign or election involved. See 5 C.F.R. §§ 151.122, 733.122.

Furthermore, the statute is not the CSC regulations, and in its operative language comprises a single sentence, stating only that a covered employee may not "take an active part in political management or in political campaigns." Hence, there is no way "to narrow its indiscriminately cast and overly broad scope without substantial rewriting," which the Court cannot do. *Aptheker* v. *Secretary of State, supra* at 515. See also, *e.g., United States* v. *Robel,* 389 U.S. 258, 262 (1967), and pp. 31-32, *supra.* The statute's prohibition is, therefore, invalid in its entirety.

C. The Hatch Act Is Overly Vague.

We fully share the view of the court below that the provisions of the Hatch Act in question are too vague and ambiguous to meet constitutional standards. See 346 F. Supp., at 580-583. In view of the comprehensive discussions of that issue in the opinion below and in Appellees' Brief, however, we shall limit our discussion in this *amicus* brief to the following observations:

1. The oft-repeated general standard applied by the Court in this area, deriving from *Connally* v. *General Const. Co.,* 269 U.S. 385, 391 (1926), is that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." While all statutes must meet this test, an additional constitutional value is involved

"where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' [as] it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden area were clearly marked." *Grayned* v. *City of Rockford,* 408 U.S. 104, 109 (1972). Hence, "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Cramp* v. *Bd. of Public Instruction,* 368 U.S. 278, 287 (1961); *Smith* v. *California,* 361 U.S. 147, 151 (1959). See also, *e.g., Ashton* v. *Kentucky,* 384 U.S. 195, 200 (1966); *Baggett* v. *Bullitt,* 377 U.S. 360, 372 (1964).

2. The demonstration by the court below, from an analysis of the language of the provisions of the Hatch Act, that "men of common intelligence must necessarily guess at its meaning and differ as to its application," confirms what the Commission on Political Activity of Government Personnel discovered through investigating the actual understandings (or lack thereof) of Federal government employees. Those investigations led that Commission to find "compelling evidence that the existing law unduly confuses and restricts more than 4.5 million Federal, State and local public employees," and to reach the unanimous view that any limits upon the political activities of those employees "should be clearly and specifically expressed . . ." See p. 10, *supra.*

3. The Government contends that the legislative history of the Act demonstrates that "it was the interpretation of the [Civil Service] Commission, as reflected in the materials adverted to by Senator Hatch,

rather than the [pre-1940] decisions themselves, that the Congress intended to incorporate" (Brief, at 37; see, also, pp. 22-24, 35-37).

a. The Government does not make clear whether the "materials adverted to by Senator Hatch" to which it refers are the "card" listing 18 categories of prohibited conduct, the "excerpt" from a CSC pamphlet purportedly setting forth "a somewhat more detailed exposition of the prohibition as construed at that time by the Commission" (Brief, at 37), or both. For example, on page 37 of its Brief, it seems to include both, but on page 24, after discussing the legislative history, it says "the interpretations which appear on the card."

b. Elsewhere in its brief, however, the Government concedes that "Congress specifically considered and rejected the possibility of trying to list specific restrictions itself, preferring the incorporation-by-reference approach" (Brief, at 48, fn. 18), and refers back to legislative history (pp. 24-25) in which "proponents of the bill" rejected a suggestion of "opponents of the legislation" that the Congress itself define the prohibited conduct "by taking the 18 statements on Senator Hatch's card and using them for the definition of political activity;" not because it was simpler to incorporate those "18 statements" by reference, but rather because, as urged by Senators Barkley and George, the proponents preferred "flexible" language because if they used specific language they "might not include many other things which ought to be included . . ."

4. In specifically responding to the vagueness argument (Brief, at 45-53) the Government primarily relies on the current regulations of the CSC, rather than upon either the "18 statements on Senator Hatch's card" or the excerpt from a CSC pamphlet, to provide the necessary definiteness, even though (as noted

above) it argues elsewhere that what the statute incorporates by reference is either those "18 statements" or both those "18 statements" and the "excerpt."

a. The Government concedes (Brief, at 47-48) that the listing in those regulations of "13 permissible activities and 13 prohibited activities" is "not a complete catalogue of all conduct that could come within the Hatch Act's prohibition," because partisan "politics in the United States is composed of a complex and multi-faceted variety of activities" and "the concept and scope of political activity changes with the passage of time and the growth and development of our political institutions." The other side of this coin, of course, is that millions of government employees must guess which of the "multi-faceted variety of activities" not mentioned in the regulations come within the Act's prohibition, and are faced with the possibility that an act or an utterance apparently not prohibited today might be prohibited tomorrow if the CSC should happen then to regard it as one of those caught up in the changes "in the concept and scope of political activity" that occur "with the passage of time and the growth and development of our political institutions."

b. Elsewhere in its Brief (pp. 74-75), the Government concedes that the CSC, in its "current regulations and publications," has "made certain minor changes from the 1939 interpretation" contained in the "materials submitted by Senator Hatch to the Congress," including "elimination of the prohibitions against discussion of liquor questions, betting or wagering on elections, and participating in a political parade as the member of a musical organization or band;" and also that the "prohibition regarding publication of letters or articles in newspapers has been significantly

modified . . . ." Moreover, the Government quotes (Brief, at 75-76) an affidavit in the record by the CSC General Counsel stating, among other things, that "we attempt to administer the Hatch Act in the context of currently accepted constitutional doctrine and other legal doctrines," and if such doctrines conflict with the Act "it is our policy that the current doctrines by which we are bound will prevail." If the Congress intended to incorporate into the Act by reference the "materials submitted by Senator Hatch to the Congress" as the Government contends at some points in its Brief, where does the CSC get the authority to reject or modify some of the prohibitions listed in those "materials" or in effect to rewrite those prohibitions to the extent it deems necessary to make them comply with "currently accepted constitutional doctrine and other legal doctrines?"

c. More broadly, where does the CSC obtain authority to issue any rules or regulations interpreting the Act's prohibition against taking "an active part in political management or in political campaigns," in the light of the following statement in the Government's Brief (p. 43):

> "The original version of Section 15 reported out of the Senate committee would have conferred rule-making authority on the Commission in defining prohibited acts of political management and campaigning, but when opponents of the Hatch Act challenged this rule-making provision as an unconstitutional delegation of legislative power to the Commission, the incorporation-by-reference approach was substituted. See pp. 20-21, *supra*. All that this signified, however, was a congressional unwillingness to give the Commission a free hand to redefine, and possibly to expand, the scope of the prohibition (see, *e.g.*, 86 Cong. Rec. 2928); in-

stead, Congress chose to establish the definitional standard itself, basing it upon the Commission's contemporary interpretation of prohibited political management and campaigning."

5. If one collects the various statements about this aspect of the Hatch Act from the different compartments in which they have been scattered in the Government's Brief, and strips them of the Government's rhetoric, we suggest that they add up to something like this:

> The Congress sought to provide the necessary definition to the broad and indefinite statutory language through incorporation by reference of the prohibitions defined in the materials referred to by Senator Hatch; on the other hand, the Congress refused to so define the statutory language in the Act because those specific prohibitions might not go far enough and the Congress thus preferred to retain the Act's more "flexible" language.
>
> In any event, the Court should not look to the prohibitions defined in the materials referred to by Senator Hatch, but rather to those defined in current CSC regulations. This is so even though the Congress refused to give the CSC authority to issue regulations defining the prohibitions of the Act and preferred instead the incorporation-by-reference approach, and even though the regulations do not track the materials referred to by Senator Hatch and purport instead to reflect current legal doctrines.
>
> Even if one looks to those unauthorized regulations, he will not find a catalogue of all the activities prohibited by the Act. Others of the great variety of multi-faceted political activities in which government employees may want to engage also may be prohibited, under the "flexible" language of the Act, or at some indefinite future

time may become so, without any further action by the Congress or the CSC to amend the statute or the regulations.

In view of this merry-go-round, we suggest that the Court need go no further than a close reading of the Government's Brief in order to understand why the court below, the Commission on Political Activity of Government Personnel, these *amici,* and many government employees are uncertain about the extent of the political actions, speeches and associations which are, and which are not, prohibited by the Hatch Act.

CONCLUSION

The Court should overrule its *Mitchell* decision, hold that the Hatch Act's prohibition on taking an "active part in political management or in political campaigns" is unconstitutional under present-day constitutional doctrines, and therefore affirm the decision below.

Respectfully submitted,

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